Supreme Court, U.S.
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No. 96-748

In The

Supreme Court of the United States

October Term, 1996

URVASHI B. PATEL, an individual,

Petitioner,

vs.

SCOTLAND MEMORIAL HOSPITAL, a North Carolina Corporation, W. Harley Davidson, an individual and Gregory C. Wood, an individual,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE C. COVINGTON
KENNEDY COVINGTON
LOBDELL & HICKMAN, L.L.P.
100 North Tryon Street
Suite 4200
Charlotte, North Carolina 28202

Attorneys for Respondent
W. Harley Davidson

PETER J. COVINGTON
Counsel of Record
JAMES H. GUTERMAN
MAURICE O. GREEN
SMITH HELMS MULLISS
& MOORE, L.L.P.
214 North Church Street
Charlotte, North Carolina 28202
(704) 343-2000

WILLIAM R. PURCELL II
WILLIAMSON, DEAN, BROWN,
WILLIAMSON & PURCELL, L.L.P.
213-C East Cronly Street
P.O. Box 1627
Laurinburg, North Carolina 28353

Attorneys for Respondents
Scotland Memorial Hospital
and Gregory C. Wood

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fourth Circuit correctly hold that Petitioner's federal antitrust claims failed to state a claim upon which relief can be granted?

2. Did the Fourth Circuit correctly determine that Petitioner's North Carolina tort claims failed to state a claim upon which relief could be granted?

PARTIES TO THE PROCEEDING

The Respondents are correctly identified in the caption. Peter J. Covington of Smith Helms Mulliss & Moore, L.L.P. is counsel of record for Scotland Memorial Hospital and Gregory C. Wood. James H. Guterman and Maurice O. Green of Smith Helms Mulliss & Moore, L.L.P. and William R. Purcell II of Williamson, Dean, Brown, Williamson & Purcell, L.L.P. are also counsel for Respondents Scotland Memorial Hospital and Gregory C. Wood. George C. Covington of Kennedy Covington Lobdell & Hickman, L.L.P. is counsel for Respondent W. Harley Davidson.

Each of the Respondents join in this brief in opposition.

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Scotland Memorial Hospital, a North Carolina not-for-profit corporation, further discloses that it is a 100% owned subsidiary of Scotland Health Care System, a North Carolina not-for-profit corporation headquartered in Laurinburg, North Carolina.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Scotland Memorial Hospital (hereinafter "SMH"), Gregory C. Wood (hereinafter "Wood") and W. Harley Davidson (hereinafter "Davidson") respectfully request that the Court deny the Petition for Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

In her Statement of the Case and characterization of the facts, Petitioner, Urvashi B. Patel (hereafter "Patel" or "Petitioner"), has attempted to recast the Fourth Circuit's affirmance of the dismissal of her plainly deficient complaint as a major departure from longstanding antitrust doctrine and as incompatible with numerous pronouncements from this Court and other courts of appeal. In fact, the district court and the Fourth Circuit correctly decided that Petitioner's claims for damages, based on Respondents' decision to permit physicians other than her to use SMH's certified registered nurse anesthetists ("CRNAs") after she failed to pass anesthesiology boards as required by her contract with SMH, were without merit and dismissed her complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Because the decision of the court below is clearly correct and consistent with the holdings of this Court and the other circuit courts of appeals, and because Patel's Petition for Writ of Certiorari raises no important matters to be resolved by this Court, Respondents respectfully submit that the petition should be denied.

Statement of the Facts

The opinion of the Fourth Circuit correctly sets forth the facts of this case and Respondents adopt the appellate court's statement of the facts.

Corrections of Misstatements in the Petition

Petitioner misstated or mischaracterized both the facts and the holding of the Fourth Circuit in an attempt to support her assertion that the Fourth Circuit has somehow staked out new ground radically different from established precedents and otherwise diverging from "the accepted and usual course of judicial proceedings . . . ." (Petition at 9.) Pursuant to Supreme Court Rule 15.2, Respondents identify and discuss the most prominent of the misstatements or omissions of fact contained in the petition.[1]

- Petitioner fails to bring to the Court's attention the fact that her complaint alleged that prior to the decision of SMH to allow other doctors access to the CRNAs, she enjoyed an *exclusive* contract to provide all anesthesiology services at SMH. (J.A. at 50.)[2]

This fact, clearly pled in Petitioner's complaints, demonstrates the futility of Petitioner's attempts to invoke the antitrust laws, and further supports the Fourth Circuit's holding that Petitioner cannot show that Respondents' actions (which allowed other practitioners to offer anesthesiology services at SMH) restrained trade. Petitioner's admitted status as an exclusive anesthesiology provider until she failed her anesthesiology boards, a fact she now elects to ignore, is part of the record upon which the Fourth Circuit correctly noted that Petitioner's complaint was "void of any allegations as to the effect of [Respondents'] actions on competition in the market

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1. Because this case was dismissed pursuant to Rule 12(b)(6), the facts alleged in the complaint are taken in the light most favorable to the Petitioner.

2. Citations to "J.A." refer to the Joint Appendix filed with the Fourth Circuit. The relevant pages of the Joint Appendix have been filed with this Court as a lodging.

for anesthesiology services . . . ." (Petition at 8a.)[3]

- Petitioner fails to inform the Court that, as a condition of the continuation of her exclusive contract with SMH, including the supervision of the CRNAs, she was required to pass the written anesthesiology board examination within two years of October 1988 or face termination and that she failed the examination. (Petition at 3-6.)

Once again, unwilling to call attention to the real reason for her changed status at SMH, Petitioner fails to mention in her Statement of the Facts that her complaint truthfully alleged that her exclusive contract was terminated after she failed to pass the anesthesiology boards within the time allowed. (J.A. at 51.) The Fourth Circuit, in more than one instance, cited this legitimate, contract-based reason for the hospital's staffing decision as support for its ruling on both the conspiracy and antitrust injury arguments urged by Petitioner. (Petition at 6a, 7a.)

- Petitioner misleads the Court regarding her status with SMH after her exclusive contract was terminated.

Petitioner's argument to this Court leaves the impression that she was excluded from SMH after her exclusive contract was terminated. She fails to point out that her various complaints alleged that she *retained* full privileges at SMH and, thus, could and did, continue to practice anesthesiology at SMH. (J.A. at 52.) Petitioner's status after the termination of her contract was clearly important to the Fourth Circuit's rulings on her antitrust

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3. Citations to "Petition at __", refers to Patel's petition or the appendix to her Petition for Writ of Certiorari, which contains the Fourth Circuit and District Court opinions.

claims and its holding that Petitioner's pleadings failed to allege the required negative impact on the relevant market. (Petition at 7a, n. 4.)

- Petitioner makes repeated references, wholly unsupported by the record, to peer review or the lack of peer review accompanying the decision to terminate her exclusive contract as raising inferences in her favor as to the motives of Respondents. (Petition at 6, 23.)

Prior to this petition, Petitioner never alleged in any of her three complaints that peer review or lack thereof associated with the decision to terminate her exclusive contract supports her contention that Respondents' justification for their actions toward her was pretextual. These new allegations are made presumably to negate the Fourth Circuit's well-supported holding that a hospital and its staff have a unity of interest in staffing decisions. Because these allegations were not raised below, Petitioner's argument and reference to peer review is clearly improper.

- Petitioner has mischaracterized the ruling of the Fourth Circuit as creating an "unqualified, complete exemption from federal antitrust law" for a hospital's staffing decisions. (Petition at 9.)

Contrary to Petitioner's arguments, the Fourth Circuit opinion does not purport to announce broad new rules of exemption from established antitrust rules for hospital defendants. The Fourth Circuit simply held that Petitioner's amended complaint (upon which its ruling was based) failed to set forth the required elements of a Section One Sherman Act claim. To assert to this Court that the Fourth Circuit created sweeping new rules of law in its opinion (a *per curiam* opinion, no less) is a misrepresentation to the Court, belied by a cursory review of the opinion itself.

REASONS FOR DENYING THE WRIT

An experienced district court judge, affirmed by a unanimous court of appeals, carefully reviewed Petitioner's pleadings and, after taking the facts as alleged to be true, concluded that Petitioner's Complaint, Amended Complaint and proposed Second Amended Complaint each failed to state claims upon which relief can be granted. The Fourth Circuit opinion is absolutely correct. More importantly for purposes of analyzing Petitioner's plea to this Court, it also is substantively unremarkable in the annals of antitrust jurisprudence, and can hardly be said to raise important matters sufficient to invoke this Court's certiorari power.

This Court has already spoken on the antitrust issues Petitioner tried unsuccessfully to raise in her deficient complaints. The Fourth Circuit did not depart from established precedents when it held that Petitioner's dissatisfaction with the hospital's decision to terminate her exclusive anesthesiology services contract failed to invoke the antitrust laws. Nor did the Fourth Circuit plow new ground when it applied the rule that a company and its officers and employees cannot conspire for antitrust purposes because of the unity of economic interest among them. Either of the Fourth Circuit's rulings standing alone was sufficient to support its affirmance of the district court's dismissal of the Petitioner's complaint. None of the other issues raised by Petitioner deal with federal law or other matters typically of concern to this Court, and none (even the antitrust issues) could even arguably merit this Court's attention.

Presumably to grab the Court's attention, Petitioner mischaracterizes the Fourth Circuit holding and then incorrectly suggests that there is a conflict among the circuits on the antitrust issues discussed by the appellate court. Petitioner's efforts to recast the Fourth Circuit opinion are nothing more than a

misguided attempt to have this Court re-examine the same complaint that has already been meticulously examined by the courts below. In sum, nothing contained in the petition provides sufficient grounds for this Court to exercise its certiorari powers.

I.

THE FOURTH CIRCUIT'S RULING ON PETITIONER'S ANTITRUST CLAIMS WAS CORRECT AND CONSISTENT WITH SUPREME COURT PRECEDENT AND HOLDINGS FROM OTHER CIRCUIT COURTS OF APPEALS.

A. Petitioner Failed to Allege Injury to Competition.

To prove a violation of Section One of the Sherman Act, 15 U.S.C. § 1, a plaintiff must show the existence of an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade. *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991) (*en banc*), *cert. denied*, 502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992). In addition to showing concerted activity, a plaintiff must show that the concerted activity caused an "antitrust injury" by imposing an unreasonable restraint on competition. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29, 104 S. Ct. 1551, 1567, 80 L. Ed. 2d 2 (1984); *National Soc'y of Professional Eng'r v. United States*, 435 U.S. 679, 690, 98 S. Ct. 1355, 1364, 55 L. Ed.2d 637 (1978); *Oksanen*, 945 F.2d at 708. This antitrust injury requirement underscores the fundamental tenet that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962)) (emphasis in original).

In a rule of reason case such as this,[4] Petitioner must allege that Respondents' conduct adversely affected competition in the relevant market defined by Petitioner. *Jefferson Parish Hosp.*, 466 U.S. at 29, 104 S. Ct. at 1567. Petitioner's complaint only alleges an injury to herself, not to competition. For example, Petitioner repeatedly asserts that because Respondents destroyed *her* practice and hampered *her* competitive ability by their refusal to allow *her* to use SMH's CRNAs, Respondents violated the antitrust laws. (*See* J.A. at 54, 56, Am. Compl. ¶ 20, 24, 25.) Based on Petitioner's pleading of a personal injury, the Fourth Circuit correctly held that economic injury to Petitioner alone is insufficient to support the necessary inference of an antitrust injury.

Notwithstanding this clear ruling, Petitioner now, incredibly and erroneously, contends that the Fourth Circuit held, in conflict with this and other federal appellate courts, that *any staffing decision made by a hospital which affects one practitioner cannot under any circumstances be the basis of liability under the Sherman Act.* Petitioner's error is obvious from the express language of the Fourth Circuit's opinion:

> [r]epeatedly, courts have found that a staffing decision by a single hospital as to a single practitioner, *in the absence of harm to the relevant market*, does not constitute an antitrust injury. Personal economic injury alone, *e.g.*, loss of income, is simply not enough to support a claim under § 1 of the Sherman Act. *There must be some cognizable effect on the competitive market. Thus, we*

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4. It is undisputed, as Petitioner conceded in her Fourth Circuit brief, that her claims must be judged under a rule of reason analysis. (*See* Petitioner's Fourth Circuit Br. at 26.)

affirm the district court's dismissal of Patel's Sherman Antitrust Act § 1 claim.

(Petition at 9a) (citations omitted, emphasis added).

Furthermore, contrary to Petitioner's completely unsupported assertion, the Fourth Circuit's opinion in this case is completely in accord with numerous other federal court decisions dealing with hospital staffing and other comparable situations. Those courts have also concluded, either at the Rule 12(b)(6) or summary judgment stage, that in a rule of reason case, an antitrust violation cannot rest solely on economic injury to a single competitor or foreclosure of a single competitor from the relevant market in the absence of any meaningful suggestion that the market is adversely affected. *See, e.g., BCB Anesthesia Care v. Passavant Memorial Area Hosp. Assn.*, 36 F.3d 664 (7th Cir. 1994) (affirming Rule 12(b)(6) dismissal of CRNAs' Section One claim where CRNAs' contract with hospital was terminated in favor of contract with physician anesthesiologist); *Bhan v. NME Hosps. Inc.*, 929 F.2d 1404, 1414 (9th Cir.) (holding that the exclusion of one nurse anesthetist insufficient to demonstrate actual detrimental effects), *cert. denied*, 502 U.S. 994, 112 S. Ct. 617, 116 L. Ed. 2d 639 (1991); *Balaklaw v. Lovell*, 14 F.3d 793, 797-802 (2d Cir. 1994) (holding that an anesthesiologist who lost an exclusive contract to other anesthesiologists did not have standing under the antitrust laws because the only injury he had suffered was an injury to himself, not competition); *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1393 (10th Cir. 1992) (affirming summary judgment, dismissing excluded radiologist's claim because "it is clear that what occurred after the implementation of the [exclusive] contract . . . was only a reshuffling of competitors."); *Lie v. St. Joseph Hosp.*, 964 F.2d 567 (6th Cir. 1992) (holding that a physician's showing of loss of personal income without suggestion of injury to competition in form of increased costs or reduced competition

insufficient to state Sherman Section One claim); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448-55 (11th Cir. 1991) (affirming summary judgment, finding that an exclusive contract between a hospital and a group of anesthesiologists did not foreclose competition); *Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) (affirming Rule 12(b)(6) dismissal of Section One claim because "removal of one or a few competitors need not equate with injury to competition"). *See generally ABA Antitrust Section, Antitrust Law Developments* (3d ed. 1992) at 49 n. 274 (citation of authorities).

Indeed, the Fourth Circuit, reflecting the essential unanimity of the appellate courts on this issue, has poignantly stated in words Petitioner in this case simply refuses to hear:

> a plaintiff cannot demonstrate the unreasonableness of a restraint merely by showing that it caused him an economic injury. For example, the fact that a hospital's decision caused a disappointed physician to practice medicine elsewhere does not of itself constitute an antitrust injury. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31, 104 S. Ct. 1551, 1568, 80 L. Ed.2d 2 (1984). If the law were otherwise, many a physician's workplace grievance with a hospital would be elevated to the status of an antitrust action. To keep the antitrust laws from becoming so trivialized, the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed.2d 333 (1990).

Oksanen, 945 F.2d at 708. *See also Harron v. United Hosp. Ctr., Inc.*, 522 F.2d 1133, 1134 (4th Cir. 1975) (affirming dismissal of action by excluded radiologist, noting, "it is *frivolous* to urge that the employment of a single doctor to operate the radiology department of a hospital invokes the Sherman Act") (emphasis added), *cert. denied*, 424 U.S. 916, 96 S. Ct. 1116, 47 L. Ed. 2d 321 (1976).

None of the cases cited by Petitioner stand for the proposition that, in a rule of reason case, an antitrust plaintiff may allege a sufficient antitrust injury without allegations that support an inference of injury to competition. In *Brader v. Allegheny General Hosp.*, 64 F.3d 869 (3d Cir. 1995), the plaintiff specifically alleged injury to competition in that plaintiff and others were prevented from engaging in the practice of a specific type of surgery in the relevant market, and that other hospitals in the relevant market were prevented from employing or granting staff privileges to the plaintiff physician for the purpose of competing with the defendants. In this case, not only did Petitioner plead that she could practice at SMH and elsewhere, Petitioner failed to provide any meaningful allegations of relevant market or injury to that market, even after being repeatedly schooled on those issues by Respondents' briefs.

Brader is further distinguishable from Petitioner's claim because the allegations relied upon by the *Brader* court suggest a group boycott by the hospitals and other physicians and the *Brader* court's language indicates it viewed plaintiff's complaint as a *per se* case, not a rule of reason case. Notably, in support of its holding that an antitrust injury is sufficiently alleged, the Third Circuit relied on *Fuentes v. South Hills Cardiology*, 946 F.2d 196 (3d Cir. 1991), a *per se* boycott case. In contrast, the present case, as Petitioner conceded in her brief submitted to the Fourth Circuit, is a classic rule of reason case.

Similarly, the Seventh Circuit's opinion in *Hammes v. Aamco Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994), is not in "conflict" with the Fourth Circuit's dismissal of Petitioner's complaint because *Hammes* involved an alleged *per se* violation of Section 1.[5] *Per se* violations presume an unreasonable restraint without inquiry into a particular context. *N.C.A.A. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 100, 104 S. Ct. 2948, 2959, 82 L. Ed. 2d 70 (1984); *see also National Soc'y of Professional Eng'r*, 435 U.S. at 690, 98 S. Ct. at 1365 (stating that *per se* violations are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality). As indicated earlier, Petitioner admits that the alleged conduct does not constitute a *per se* violation of Section One, but rather is conduct that must be evaluated under the rule of reason.

The Supreme Court cases Petitioner cites also do not conflict with the lower courts' rulings in this case. For example, *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991), only holds that the necessary effect on interstate commerce to support subject matter jurisdiction under the Sherman Act may be met by allegations that a hospital, its owners and medical staff conspired to exclude one physician from the relevant market. Nothing in *Pinhas* suggests that meeting this threshold burden relieves the Petitioner of alleging, with factual support, that the agreement in the form of a contract, combination or conspiracy, imposes an *unreasonable* restraint on trade. *See also Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976).

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5. In *Hammes*, the Petitioners, franchisees of AAMCO Transmissions, Inc., alleged that the defendants were misusing the franchisee advertising pool to reduce their ability to compete. The Seventh Circuit noted that those allegations suggest "an out-and-out scheme of customer allocation" which "would be a *per se* violation of Section 1." *Id.* at 782.

Similarly, *Patrick v. Burget*, 486 U.S. 94, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988), does not deal with antitrust injury analysis. Instead, it addresses the limits of the state action doctrine, which generally exempts state action or official action directed by the state from the reach of the Sherman Act, by exempting physicians from liability under that Act for initiating and participating in hospital peer-review committee proceedings, an issue not raised in this case. *See also National Gerimedical Hosp. & Gerontology Center v. Blue Cross*, 452 U.S. 378, 101 S. Ct. 2415, 69 L. Ed. 2d 89 (1981).

Petitioner's complaint makes one point abundantly clear: her only complaint is that Respondents made a decision which adversely affected her income and practice. Despite ample opportunity, she completely failed to make any allegations that would support an inference of any injury to competition in any defined market. She did not because she could not. At best, Petitioner's allegations are nothing more than components of a "workplace grievance"; they do not set forth an antitrust injury and thus do not state an antitrust claim as a matter of law. The Fourth Circuit correctly so found and its decision is amply supported.

B. The Fourth Circuit Correctly Determined that Petitioner Failed to Meet the Minimal Requirements of Pleading Adverse Effects On Competition.

The Fourth Circuit correctly held that Petitioner must "allege in her complaint a relevant market, facts demonstrating that trade was restrained in that market, and that the defendants played a significant role in restraining trade." (Petition at 8a.) The Fourth Circuit also noted that "the district court found . . . that her complaint was completely void of any allegations as to the effect of the defendants' actions on competition in the market of anesthesiology services, effect on the price of anesthesiology

services, or the effect on the availability of anesthesiology services to the public. Rather, it found her complaint focused on the injuries she incurred, not those the competitive market incurred." (Petition at 8a-9a.) According to Petitioner, the application of these established rules to her complaint equate to the imposition of a "heightened pleading standard."

The pleading requirements noted by the Fourth Circuit in this case comport with Rule 8 of the Federal Rules of Civil Procedure (complaint requires "a short and plain statement of the claim showing that the pleader is entitled to relief") and the ruling of this Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). In *Leatherman*, this Court rejected the Fifth Circuit's heightened pleading standard for § 1983 actions which required plaintiffs to plead with "factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Leatherman*, 507 U.S. at 167, 113 S. Ct. at 1163 (citing *Elliott v. Perez*, 751 F.2d 1472, 1473 (1985)). *Leatherman* simply reestablished that for § 1983 claims, a pleader must only meet the requirements of Rule 8. *Id.* The Fourth Circuit, in this case, did not require that Petitioner plead beyond the Rule 8 standards. It simply applied those standards to her woefully inadequate pleadings with predictable results.

The Fourth Circuit's position on the adequacy of pleadings in the antitrust context had been set forth previously in *Estate Construction Co. v. Miller & Smith Holding Co.*, 14 F.3d 213 (4th Cir. 1994), which was decided after this Court's pronouncements in *Leatherman*. In *Estate Construction*, the Fourth Circuit held that "[w]hen confronted with a motion to dismiss a Sherman Act § 1 complaint pursuant to Fed. R. Civ. P. 12(b)(6), [the district court] must determine whether 'allegations covering all the elements that comprise the theory for relief'

have been stated as required." *Estate Constr.*, 14 F.3d at 220 (citation omitted). "Moreover, the allegations must be stated in terms that are neither vague nor conclusory." *Id.* at 220-21. "A mere allegation that 'the defendants violated the antitrust laws as to a particular plaintiff and commodity' is insufficient to survive a Rule 12(b)(6) motion." *Id.* at 221 (citation omitted).

The application of the *Estate Construction* rule to Petitioner's case is not a "heightened standard" and is not inconsistent with rulings from other courts of appeals. Numerous other courts have held that a plaintiff must furnish factual allegations indicating the existence of a factual basis for all elements of the claim in order to proceed on a Sherman Act claim. *See, e.g., Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988) (stating, "[t]he essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's 12(b)(6) motion"); *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 179-80 (3d Cir. 1988).[6]

Because Petitioner's complaint failed to allege the relevant geographic and product market, or the market shares or market power of any participant in the relevant market, Petitioner's complaint was correctly dismissed as failing to state a claim under the Sherman Act.

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6. Petitioner's citation to *Hammes* is misleading. (Petition at 22.) In *Hammes*, the Seventh Circuit held that, in order to meet the *jurisdictional requirements* under the Sherman Act, it is probably sufficient to plead that plaintiff was engaged in interstate commerce and was injured by the alleged antitrust violations. 33 F.3d at 781-82.

II.

THE FOURTH CIRCUIT OPINION THAT A HOSPITAL AND ITS MEDICAL STAFF CANNOT CONSPIRE, IN VIOLATION OF SECTION ONE OF THE SHERMAN ACT, WHERE THE MEDICAL STAFF HAS NO INDEPENDENT, ECONOMIC MOTIVE ON ITS PART CREATES NO CONFLICT AMONG THIS COURT AND THE CIRCUITS.

In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) this Court established the rule that the unilateral actions of a single enterprise are immune from Section One liability despite any resulting restraint on trade, and further noted that "[t]he officers of a single firm are not separate economic actors pursuing *separate economic interests*, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Id.* at 769, 104 S. Ct. at 2740-41 (emphasis added). Subsequently, the Fourth Circuit has applied the intracorporate immunity doctrine announced in *Copperweld* to the operations of a hospital and held that there is a unity of interest present in the relationship between the hospital and its staff — both seek to upgrade the quality of patient care. *Oksanen*, 945 F.2d at 703-05.

In this case, the Fourth Circuit has done nothing more than apply the rules of *Copperweld* and *Oksanen* to hold that the Respondents had a unity of interest in the staffing decisions that led to Petitioner's changed status and thus, for antitrust purposes, are one and the same and incapable of conspiring. *Cf. Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990) (holding that hospitals and pediatricians are shielded by intracorporate conspiracy doctrine; however, obstetricians who competed with midwives not shielded), *mod. on rhg.*, 927 F.2d

904 (6th Cir.), *cert. denied*, 502 U.S. 952, 112 S. Ct. 406, 116 L. Ed. 2d 355 (1991).[7]

The Fourth Circuit's holding is not a departure from this Court's teachings. As the Fourth Circuit noted, based on the allegations in the complaint, Davidson is clearly an agent of the hospital.[8] (Petition at 6a.) In reality, stripped of its conclusory adjectival phrases, the complaint alleges no more than actions by a hospital, its chief executive officer and a member of its staff to enforce a valid contract provision relating to the professional qualifications of its director of anesthesiology. Such conduct, on its face, relates to the appropriate staffing of SMH and to patient care, concerns about which all Respondents shared an obvious, valid and unitary interest. As the Fourth Circuit stated in this case:

> [m]embers of the hospital staff, especially those with administrative positions, such as Chief Administrator, clearly have responsibilities to ensure adequate and quality care by the staff at the hospital,

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7. The Ninth and Eleventh Circuits have held that the hospital and its medical staff may be treated as legally separate entities. *See Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810 (11th Cir.) (holding that members of hospital staff were capable of conspiring with hospital), *cert. denied*, 495 U.S. 924, 110 S. Ct. 1960, 109 L. Ed. 2d 322 (1990); *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988) (holding that staff anesthesiologists were sufficiently independent from hospital in pursuing their own economic interests). As discussed *infra* and notwithstanding this divergence of views, it is clear that all circuits are in agreement that the entities must, in order to conspire in violation of Section One of the Sherman Act, have independent *economic* motives, the critical issue in this aspect of the case.

8. As "Chief Administrator" of SMH, Wood is undoubtedly a member of SMH's staff. Therefore, he is incapable of conspiring with SMH. *See Copperweld*, 467 U.S. at 769 & n. 15, 104 S. Ct. at 2740-41 & n. 15.

> protect against malpractice, ensure efficient operation, cut costs, and the like. Staffing decisions and directives by the staff, and particularly the Chief of Staff or Chief Administrator, to that end are made as agents of the hospital.

(Petition at 6a.)

It is also undisputed that Davidson neither had a direct economic interest in Petitioner's status at SMH nor competed with her. (J.A. at 52-54.) The complaint, in fact, affirmatively suggests that Davidson has a non-competing relationship with Petitioner: Davidson is a pathologist; Petitioner is an anesthesiologist. (J.A. at 52, Am. Compl. ¶ 14; J.A. at 50, Am. Compl. ¶ 7.) These allegations preclude any favorable inference as to this element. In particular, Petitioner's attempt to allege that Davidson was "acting on his own behalf" fails because there is no allegation or supportable inference that Davidson was acting in his own *direct economic* interest, the standard suggested in *Copperweld* and routinely used by the circuit courts.[9] *See, e.g., Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1136-37 (3d Cir. 1995) ("The exception to the general rule [of intracorporate immunity] should arise only where an agent acts to further his own economic interest."); *Pink Supply Corp. v. Hiebert, Inc.*, 788 F.2d 1313, 1317-18 (8th Cir. 1986) (personal stake exception exists where agent of employer had a direct *economic* stake in the gain to be realized from the conspiracy); *Oksanen*, 945 F.2d at 705 (citing *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974)).

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9. At most, the complaint alleges that Davidson was acting pursuant to some personal, non-economic agenda, not relating to a matter of antitrust significance.

Even Petitioner's purported conflicting circuit court authority does not support her position or argue in favor of reviewing the Fourth Circuit opinion. The plaintiff in *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988), was a nurse anesthetist and the alleged conspirators were anesthesiologists competing with the plaintiff for business at the defendant hospital. The Ninth Circuit specifically stated that the "anesthesiologists were independent contractors pursuing their *personal economic interests* when they pressured [the hospital] to eliminate [the Petitioner] *as a direct competitor*." *Id.* at 1450 (emphasis added). *Oltz* simply has no application to the facts of Petitioner's complaint.[10]

Petitioner's failure to allege — in fact, her complete inability ever to allege — an antitrust conspiracy among Respondents was one of the compelling reasons for dismissal of her antitrust claim.

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10. Petitioner's reliance on *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968); *American Med. Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519, 63 S. Ct. 326, 87 L. Ed. 434 (1943), and *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920) is also misplaced. Those cases do not remotely address the intracorporate immunity doctrine at issue here.

For example, in *Albrecht*, the Supreme Court addressed allegations of a conspiracy among independent economic entities. The Court did not even address the intra-enterprise issues raised in this case by Petitioner's pleadings. To the extent that *Albrecht* is even remotely relevant, however, it is clear from the facts that the alleged conspirators in that case solicited and serviced plaintiff's customers in *direct competition* with plaintiff. *Id.* at 147-48, 88 S. Ct. at 870.

III.

THE FOURTH CIRCUIT CORRECTLY DECIDED PETITIONER'S NORTH CAROLINA TORT CLAIMS AND HER PETITION RAISES NO IMPORTANT MATTERS WHICH NEED TO BE DECIDED BY THIS COURT.

The district court (whose opinion the Fourth Circuit adopted as to the state law claims) correctly construed her pleadings and dismissed her state law claims based on established North Carolina precedents which are clearly cited in the district court's opinion.[11] (Petition at 31a-35a.) Petitioner's protestations to the contrary should be disregarded. In addition, even assuming *arguendo* that the lower courts dismissed the claims based on a misunderstanding of the facts, this Court should not grant the petition on these claims because the uniquely state law issues raised are of limited national importance and application and are thus generally not a proper subject for the exercise of this Court's extraordinary certiorari authority.

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11. Petitioner's statement that the district court ruled without reference to "a single North Carolina case" is once again belied by the record. The district court's opinion contains numerous citations to North Carolina cases. (Petition at 31a-35a.)

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

PETER J. COVINGTON
Counsel of Record
JAMES H. GUTERMAN
MAURICE O. GREEN
SMITH HELMS MULLISS
& MOORE, L.L.P.
214 North Church Street
Charlotte, North Carolina 28202
(704) 343-2000

WILLIAM R. PURCELL II
WILLIAMSON, DEAN, BROWN,
WILLIAMSON & PURCELL, L.L.P.
213-C East Cronly Street
P.O. Box 1627
Laurinburg, North Carolina 28353

Attorneys for Respondents
Scotland Memorial Hospital
and Gregory C. Wood

GEORGE C. COVINGTON
KENNEDY COVINGTON
LOBDELL & HICKMAN, L.L.P.
100 North Tryon Street
Suite 4200
Charlotte, North Carolina 28202

Attorneys for Respondent
W. Harley Davidson